IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION MDL 2406

CASE NO.: 2:13-cv-20000-RDP

VOLUME III

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MOTION HEARING

FOR FINAL APPROVAL OF CLASS SETTLEMENT

OF SUBSCRIBER PLAINTIFFS' CLAIMS

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BEFORE THE HONORABLE R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE, at Birmingham, Alabama, on Wednesday, October 27, 2021, commencing at 9:59 a.m.

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(Other counsel were present via telephone but not identified)

Proceedings reported stenographically via remote videoconference; transcript produced by computer.

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(The following proceedings were heard before the Honorable R. David Proctor, United States District Judge, at Birmingham, Alabama, on Wednesday, October 27, 2021, commencing at 9:59 a.m.:)

THE COURT: All right. There's a saying in life: If you're not early, you're late. We're about a minute till, but I thought we'd go ahead and get started.

We're here in In Re: Blue Cross Blue Shield Antitrust Litigation, MDL Number 2406, our master file number 13-cv-20000.

The Court conducted a full two-day fairness hearing last week. The Secretary of Labor had requested leave to file a statement of interest and to participate in the fairness hearing. I granted that by order yesterday. Last week, we agreed, though, that we would take up the Secretary's concerns

in a Zoom call this week. That's been scheduled, and we are here.

I know we've got 68 participants on Zoom and probably a many number -- a greater number than that participating or listening in by phone. I appreciate everyone maintaining yourself on mute unless you are not -- unless you're presenting to the Court, just to avoid any background noise.

Who will be speaking on behalf of the Secretary of Labor?

MR. HAHN: Your Honor, I will be. This is Jeff Hahn.

THE COURT: Thank you.

MR. HAHN: And my colleague, Wayne Berry, is here as well.

THE COURT: All right. Thank you.

So I'm going to get -- let you get started. Just a couple of clarifying questions. Your request had made a reference to appearing as amicus curiae. Technically, in the district courts, we don't have friends. We have people who have an interest in the case, and I recognize you as that. The Supreme Court and Court of Appeals, they have more friends than us, as it turns out.

MR. HAHN: (Nods head)

THE COURT: I'm wondering, though, if you're properly characterized as a governmental objector or just a government agency stating a concern about the settlement. How would you

characterize yourself?

MR. HAHN: Well, at this point, I think consistent with the -- how we styled our brief, I think we are a government entity stating concern about the case. As I can get into, we are talking with the parties about ways to resolve those concerns. So at this point, I would just characterize us as stating concerns.

THE COURT: All right. And I've got your written submission regarding those concerns. I feel like I probably ought to let you go ahead and get started. How would you give me a helicopter ride over the concerns at this point?

MR. HAHN: Sure. Well, before I do that, Your Honor, I just want to thank you for allowing us to appear today and file our statement of interest. And I also, as I was alluding to, want to make clear before I get into an overview of our concerns that, you know, our -- even though those concerns are very real, the -- our intention is to be practical and constructive. And to that end, we have been talking to the parties for some time about ways to resolve those concerns while retaining the existing structure of the agreement. We have no such agreement with the parties at this point. We did not have one last week. So obviously, we felt we needed to file our statement of interest.

So in terms of why we're here in the first place, as Your Honor knows, ERISA plans are among the class members in

this case alongside the employers responsible for those plans and the employees who participate in those plans. And as their status as class members I think indicates, ERISA plans are distinct entities that -- from the employers that can sue and be sued. And ERISA makes that explicitly clear.

Furthermore, the fiduciaries who oversee ERISA plans have duties that run exclusively to those plans and not to the employers that sponsor them. And that is true even if the employer is also the fiduciary. When acting as fiduciary, the employer must act only in furtherance of the plan's interests and not its own. And this distinction between employer and plan is also reflected in ERISA's prohibition on plan assets inuring to the employer's benefit. So the upshot, as background, is that plans and employers are in no sense one and the same.

And so with that as backdrop, the central problem from our perspective with this agreement is that it does not treat the ERISA plans as distinct class members with distinct -- with the distinct interests that they have. It, instead, appears to give the lion's share of the recovery to the employers -- and this is the important point -- while, at the same time, requiring the plans to release their claims against the Blue Cross defendants, which are plan assets, in exchange for their potentially nonexistent recovery. And that act, in our view, could be a fiduciary breach and what's called a prohibited transaction in ERISA.

So just to illustrate our problem I think most vividly, make it a little bit more concrete, is when you consider what happens with employees when employees in ERISA plans do not make claims to the claims administrator. As I'm sure the Court knows, when an employee makes a claim -- let's assume it's a fully insured plan and let's assume also the employee is not making a claim under the alternative method. They're making a claim under the default option. They are entitled to recovery based on an assumption, in a self-only situation, that they paid -- 15 percent of their premiums came from their own employee contributions. And the employer, in that instance, gets the recovery for that employee's premiums under the assumption that the employer paid 85 percent of the premiums.

But when employees do not make a claim, then a hundred percent of the premium for that employee gets -- reverts to the employer. And, of course, a hundred percent includes the portion of the premium that was paid for with employee contributions. And in our view, it's one thing for employers to obtain recoveries attributable to their own employer contributions, but there is no conceivable justification, in our opinion, for employers to obtain recoveries attributable to employee contributions. That -- those recoveries should, in the first instance, go to the employees if they make claims. If they do not make claims, they should go to the plan in which the employees participated and to which they made contributions.

And so the fact that the settlement agreement -- and this is sort of the low-hanging fruit here -- does not ensure that these what I'll call unclaimed employee contributions go to the plan exemplifies -- or best exemplifies, in our view, why the plans do not seem to be adequately represented in this negotiation. And it also --

THE COURT: Let me ask you this. On adequate representation, we do have several class members who are plan named fiduciaries; correct?

MR. HAHN: It's for -- I think that's correct.

THE COURT: So why wouldn't that, in and of itself, be adequate representation, at least on the surface? And then the question becomes, well, did they act -- have they acted inconsistently with class member interests. So how would you respond to that?

MR. HAHN: Well, certainly -- so, many employers are also fiduciaries. So this is a point that's been made quite a bit by the parties. And so to that extent, yes.

THE COURT: For example, Hibbett Sports. Hibbett Sports is one; correct?

MR. HAHN: I don't know for sure if they are a plan administrator, but we can stipulate that they are for purposes of this discussion.

THE COURT: Okay.

MR. HAHN: I think that the concern is that, you

know -- that they may well have been -- you know, many of these class members are fiduciaries. We can stipulate to that. But, again, the fact that this agreement does not, at the very least, ensure that these unclaimed employee contributions go to the plan's benefit indicates that they were not acting or thought of themselves as fiduciaries in the context of this agreement.

THE COURT: Let's say XYZ Company has -- is a plan fiduciary and has a responsibility along the lines you've just outlined with respect to your -- to an ERISA plan fiduciary and they make a claim as part of the claims administration procedure in this case. They receive funds. At that point, what occurs to those funds downstream may or may not be consistent with ERISA obligations; correct?

MR. HAHN: Well, that's correct. Yeah. And I think I would say -- I would say -- one thing I want to make clear is it's not clear what ERISA obligations would apply. Once there's been a distribution made to an employer under this agreement, I mean, it's not exactly clear what the ERISA obligations are. And even if they -- even if that --

THE COURT: Forgive me if I say this. There's not a lot clear about ERISA to begin with.

But my point is this. The settlement does not dictate what a plan fiduciary does with the money it receives as part of a claim. It can act wholly consistent with its ERISA obligations and distribute the money consistent -- the

settlement proceeds consistent with those obligations. Your position, I think, would be they in fact have the responsibility to do just that; correct?

MR. HAHN: Well, certainly to the extent they have ERISA obligations over their settlement recoveries, they absolutely have that obligation.

THE COURT: So what --

MR. HAHN: I think the question --

THE COURT: So what about the settlement prohibits or makes it unlikely or more difficult for a plan fiduciary to comply with ERISA?

MR. HAHN: Well, certainly nothing prohibits compliance with ERISA. The question, I guess, is would ERISA even apply to a recovery by an employer under the terms of this agreement. Because, you know -- and I'm -- I can't say one way or the other at this point. Still looking at that. But, you know, it's not at all clear that -- let me just give you an example of when I think it clearly would apply.

If this agreement earmarked money for the plans and money were distributed to an employer for the benefit of the plan, then clearly the plan would have an interest in that distribution. The employer's receipt of that distribution would be something over which they would have fiduciary obligations. And, you know, we may not even be here. But it's not at all clear that that is the state of play here.

I mean, it -- you know, the employers are getting this money under this agreement, which does not appear to give the plans money. And so in that circumstance, it's not at all clear what obligations they have. And even if -- even if we could, you know, say that they had some obligations, it's a question of whether or not they would follow that.

But I think the first -- the first --

THE COURT: Let me ask you this. If you were drafting this settlement agreement in a way that you think is consistent with your arguments today, what would look differently about it? What would it say?

MR. HAHN: Well, again, just as an example -- I mean, and not going to say this would be the only thing, but just as an example, I think in our view, at the very least, what I referred to earlier as the unclaimed employee contributions. So when employees fail to make claims, instead of, as it currently stands, that a hundred percent of that employee's premium goes to the employer, at the very least, the employee contribution portion of that premium would go -- would be separately earmarked for the plan. I think that would be something, just as an example, that we would have expected in -- if -- in this agreement.

THE COURT: Well, but if the employer, in some -- through whatever operation the claims procedure currently has in place, ends up with those funds, the employer still may have

responsibilities to take some action with respect to those funds consistent with its fiduciary duty; right?

MR. HAHN: Well, that's a difficult question, quite honestly. And I think -- I think the concern is if the ERISA plans, as class-member plaintiffs in this case, agreed in the settlement agreement, arguably, to -- that the employers could have that money, then, you know, it's not clear what ERISA obligations the employers would have over that. That's money they're getting under an agreement which the plans, as class members, appear to agree. So I don't want to answer definitively on that at this point because we're still looking at that, but it's a difficult question under this agreement, as --

THE COURT: Y'all received notice of this within the time frame contemplated by CAPA. It doesn't really help me a lot as I'm sitting here trying to approve this and you say, well, we're still studying that.

MR. HAHN: Well --

THE COURT: If it's that murky, then I don't know that I'm going to be able to figure it out.

MR. HAHN: Well, I think the murkiness is -- well, just on the notice thing, we did -- unfortunately, we got notice of this much later than when we hoped to have; but regardless, that's water under the bridge.

THE COURT: When did you get -- when did you receive

a -- when did you receive your notice of the settlement?

MR. HAHN: From what I understand, we didn't -- we weren't notified of the settlement or we didn't hear about the settlement until I think May. And my colleague, Wayne Berry, can speak more to it if you're interested, but that's my understanding.

So -- but to answer your question, the murkiness of that question I think sort of just underscores the point, which is that, you know, this is not how, if this were properly negotiated, that this would go because, you know, it's just entirely unclear what would happen if, again, this money is distributed to employers and then they're just -- they are left with their own offices to allocate it as they see fit, whether under ERISA or otherwise.

THE COURT: Let me back you up on this May date. My understanding was that on November 7, 2020, so almost a year ago, the settling defendants provided notice of the settlement to appropriate federal and state officials under CAPA, and that included the United States Department of Justice. According to your letter, DOL did not learn of the settlement until six months later. Is that because Justice fell down on its job in getting you notice of this settlement?

MR. HAHN: That -- yeah. I don't -- I don't know -- that's -- it might not have been clear that -- you know, from this settlement that DOL's, you know, equities would be

implicated. So I don't want to blame Justice, per se, but it didn't wend its way to us from Justice. We learned about it through outside practitioners. Again, my colleague can add more color, I think, to that if -- that's fairly --

THE COURT: Justice is responsible for disseminating the notice within the United States under CAPA internally; right?

MR. HAHN: I'm sorry. Did you say somebody is?

THE COURT: Someone at Justice has the responsibility of notifying its clients -- Justice is your lawyer in this -- at least in this respect; right?

MR. HAHN: As far as I understand, that's correct.

THE COURT: So they've got a responsibility internally and within the United States to provide notice, so -- all right. Let's say that you should have gotten notice earlier than May. You still got notice five months ago. The settlement agreement's -- I guess I'm still trying to figure out exactly what your -- what you would -- if you would have been sitting at the table from day one and you had your way, how this settlement would look -- provisions would look differently.

MR. HAHN: Well, yeah. Again, I mean, I just want to give you that example because that, to me, is the most salient example, which, again, is --

THE COURT: Okay. So unclaimed employee contributions should have been separately earmarked into a separate fund that

the claims administrator would have made sure went to employees rather than relying upon the employer to get them into the right fund after receipts.

MR. HAHN: Correct. And I think it is that any money attributable to employee contributions should not go to the employers. It should go to the employees or to the plan. And that should be clear in the -- that should have been clear in the agreement.

THE COURT: Employees can make their own claim --

MR. HAHN: Yes, sir.

THE COURT: -- with respect to the premium portions they've paid; right?

MR. HAHN: Correct.

THE COURT: All right. You're talking about the percentage of the employer contribution that you think benefits the employees.

MR. HAHN: Yeah. I'm talking about -- again, I'm talking about to the extent employees don't make claims -- and of course, not all of them will be making claims. That's sort of baked in the cake here. We know that that's going to be the case. The current agreement contemplates that in that instance, 100 percent of the premium paid for that employee will go to the employer.

THE COURT: So let me ask you this. What's been your experience in the past with respect to these large financial

settlements with multiple -- in this case, it looks like we're going to have millions of claims. Is it not reasonable for the parties to task the settlement administrator with making a payment to an employer in this instance and then the employer has the legal obligation about what should be done with respect to that payment? And the -- otherwise, the claims administrator becomes almost the supervisor of ERISA obligations. Why not just pass that -- why not pass that downstream to the employer? And if the employees think the employer has not done -- not fulfilled its responsibility under ERISA, they could bring an administrative or litigation claim against the employer in that instance rather than making a settlement administrator police this for what may be millions of employers.

MR. HAHN: So let me just clarify. The central problem in this settlement is not what ERISA requires of the settlement funds. The problem is that there appeared to have been no, you know, representation and, thus, assurance -- or adequate representation and, thus, assurance that the settlement itself earmarks money for the plans. And so --

THE COURT: My -- I think you're -- and maybe I wasn't clear with my question. Let me take another shot at it.

You're saying this money should be earmarked up front by the settlement agreement, in effect, the settlement administrator; right?

MR. HAHN: Well, yeah. You asked me what would be --

how would I -- what would be the ideal way of making --

THE COURT: Yes.

MR. HAHN: Yes.

THE COURT: You said we should have had a -- we should have a separate procedure when we have a situation like this where the money -- rather than being paid directly to an employer and trusting the employer to do what's right, we should have forced that issue earlier on in the process, in the claims process, and simply earmarked that money into a separate fund for employees to come make a claim at that point.

MR. HAHN: Correct.

THE COURT: Is that your argument?

MR. HAHN: Well, for -- yeah, for that. It would be separately earmarked such that it was clearly money for the plan's benefit. And the importance of that is that once that is -- if that was the case, then -- clearly the plan has an interest in that money. That is a plan asset. And so if the employer gets that money sort of on behalf of the plan, there's no question at that point; but if the employer has --

THE COURT: All right. Let me ask you this. I understand your argument. I'm trying to get a question to you now.

MR. HAHN: Sorry.

THE COURT: Each plan is different, though; right? There's not going to be a uniform percentage across the board

that applies to all plans about what would be earmarked under your example; true?

MR. HAHN: Well, again, it wouldn't -- I don't know if I would -- again, the way I was just conceptualizing it, it would simply be -- you take the same exact default percentages that are in the agreement. It would simply be that for the employees who don't submit claims -- you know, instead of if they submit a claim, 15 percent goes to the employee, the change that I'm referring to is if they don't submit a claim, then the 15 percent that would have gone to them had they submitted a claim would go to the plan. So that's the only thing --

THE COURT: You're the settlement administrator. You're the settlement administrator. Are you going to have to then figure out with respect to each plan whether and how many employees submitted claims before you'll know what the earmark should be?

MR. HAHN: I think that would be -- that would have to be the case because what I -- what I just described to you would be a situation where all unclaimed employee contributions are going to the plan; thus, you would have to know how many, you know, people have submitted --

THE COURT: How many employees made claims.

MR. HAHN: Correct.

THE COURT: So you're going to have a pretty complicated case-by-case calculation or analysis for each of the

many different plans that are at issue in your statement of concerns as opposed to simply saying, all right, employers, here's the money for employee claims, employer claims; you treat this money as you should under the law.

That goes without saying, doesn't it, that the employer should have to do that?

MR. HAHN: Yeah. I guess -- again, the problem, though, it is not at all clear what the law requires of employers in receipt of distributions under the terms of this agreement.

THE COURT: Is it clear what the law requires in terms of what would be earmarked in each -- on an across-the-board -- in other words, what I'm -- your procedure that you're suggesting may increase the settlement administrator's work exponentially. Do you see that?

MR. HAHN: Well, so -- you know, and this question might be better put in the first place to the parties' counsel. We have not talked to them in any granular detail about the logistics of how this particular proposal would work if the administrator were to have to figure out how much to -- how many unclaimed employee contributions there were.

THE COURT: I think that's an excellent idea. I think that's an excellent idea, and you're being practical. So let's let them weigh in at this point on this particular concern. And maybe I'm just misperceiving it. I'm trying to understand your

argument. I'm trying to see how this would work practically on the ground, if your proposal won the day, for our settlement administrator.

Who wants to speak to that in terms of a proponent of the settlement and someone who opposes the Department of Labor's concerns?

MR. BOIES: Your Honor, this is David Boies.

I think Mr. Hume is going to address this generally, but I wonder if I could just ask a question. Because I think I might -- I might see a way through this if I understand Mr. Hahn's position.

As I understand Mr. Hahn's position -- and correct me if I'm wrong -- the concern here is that the settlement agreement, the way it's drafted, may immunize or take away an obligation that the employer would have under ERISA.

Do I understand that correctly?

MR. HAHN: Yeah. That is one way of putting it. I guess I would just say the agreement arguably, you know, by granting -- by seeming to grant employers this right, essentially might answer the ERISA question. If plans are giving away their rights to the employer, then that's the end of the -- that's the end of the -- yeah.

MR. BOIES: And I wonder whether, if that's the case, if that's the concern, this couldn't simply be solved by providing in the final approval order -- and providing notice of

that to the employers -- that this does not in any way affect their obligation under ERISA and that, for example, if they have employee contributions that they are getting paid for, they have an obligation to put that into the ERISA plan. Wouldn't that solve the problem that you're talking about?

MR. HAHN: Well, again, I mean, look, any order we could get that would require that I think would be good. It's a question of, you know, in fact, what does ERISA require of employers who are in receipt of distributions under the terms of this agreement, which, again, appears to give employers, you know, the full -- you know, the full boatload of contributions.

THE COURT: I think Mr. Boies is highlighting the fact that there are two concerns that you may be articulating. One is -- and the one he's addressing is the bigger one for me.

The first, though, is that you think the procedure should force the claims administrator to police the division on a plan-by-plan basis such that these funds that you contend should be going directly to the plans for the benefit of the employees don't end up in the employer's pocket. So you think there should be a procedure to make sure that occurs. Okay? That's the first concern.

My answer to that would be, all right, I think it would be more efficient to have the employer be able to make the claim on behalf of the plan and the employer. And in many instances, an employer is both the sponsor of a plan and the fiduciary of

the plan. But let them make the claim, and then the expectation is they will comply with their fiduciary responsibilities in the unique facts and circumstances of the proceeds that come forward on that claim.

Mr. Boies has highlighted a second concern that makes sense to me, and that is we don't want to make sure anything in the settlement immunizes the employer from having to perform its duties after the fact and would, in some way, run end-around the efficiency we're trying to build in there.

MS. JONES: Your Honor, that's -- I apologize if you weren't done.

THE COURT: Go ahead, Megan.

MS. JONES: Yeah. So one of the -- I'm happy to report that what you just articulated is one of the actual points we all agree on, which is that the rights of an ERISA plan to an employer are not affected by this agreement, which is --

David, which is what you were trying to articulate.

And the settlement agreement between the parties -- you can see Zach is nodding. We all agree from the plaintiffs and the defendants that an ERISA plan's rights to sue an employer if they don't like what happens is unaffected by this agreement.

THE COURT: And does that -- do we have to do anything to clarify that in the approval order?

MS. JONES: No, we do not, Your Honor.

THE COURT: But it wouldn't hurt.

MS. JONES: I just -- I apologize.

THE COURT: It would not hurt, though.

MS. JONES: It --

THE COURT: It would not hurt to acknowledge that the parties --

MS. JONES: Correct.

THE COURT: -- have drafted the settlement agreement --

MS. JONES: Correct.

THE COURT: -- and the only thing the Court is approving is a limitation on any waiver such that a plan would not waive any claims against the employer.

MS. JONES: That's correct. And to set the table for what Hamish is going to talk about and what Your Honor briefly touched on, we do have approximately seven million claims to date. 230,000 of those are employers. We have some individuals. We have many, many employees. And to be able to do the kind of granular work that the DOL is perhaps suggesting would require granularity on all of those claims because we would have to find out within the seven million are there Google employees if Google submitted a plan.

And so I think administratively, you know, if you did the math of, you know, one hour per claim -- you know, per claimant of seven million people, you can see the amount of expense -- because someone is going to have to pay for that -- and as well as the burden and timing of getting money to the

class.

THE COURT: It would slow down everybody getting funds --

MS. JONES: It --

THE COURT: -- and particularly -- and it would particularly, arguably, slow down even more the beneficiaries of the provision. Because if you're an employee and you've got a Google employer who got flagged, it may be that some people get checks cut because it's clear they're not employed by any of the 250,000 employers --

MS. JONES: That's right. That's right.

THE COURT: But there's going to have to be substantial work done trying to separate wheat and chaff.

MS. JONES: That's right. And, you know --

THE COURT: So my idea is efficiencywise, it makes sense to let that process occur downstream, after the money is paid in, with the full understanding, though, that if it's not done, everyone has recourse.

MS. JONES: That's right. And this is -- you know, Your Honor is well familiar with the kind of class settlements that occur. You know, in the municipal bonds case in front of Judge Marrero, we distributed tax-exempt proceeds back to municipalities. And we did not confer with the IRS about making sure they did the right thing with those funds.

I think Your Honor knows, from medical devices to

drugs, we make distributions to claimants. We don't check about divorce settlements or beneficiaries or where the money actually goes and whether they report it to the IRS. That's usually not aligned with --

THE COURT: And the end result of that would be if there is actually a dispute that occurs between a plan and an employer --

MS. JONES: That right is unencumbered.

THE COURT: -- the plan is going to be much more able to enforce rights efficiently if they can go straight into a court of competent jurisdiction and assert that claim as opposed to get in line with everyone else here and eventually work their way to my desk and have me enforce that.

MS. JONES: That's our view.

THE COURT: That seems to me to be another huge efficiency with the current system.

But I think Mr. Hahn's point -- second point is well taken, and that is we need to make sure that there's no bar built in here that would immunize an employer from that.

MR. BOIES: Yes.

MR. HOLMSTEAD: Your Honor, this is Zach Holmstead for the defendants. I just wanted to confirm that we agree that the settlement agreement does not release any claims that an ERISA plan might have against the employer. And that's been clear in the agreement since day one. We're comfortable if the Court

wants to state that in the final approval order. This obviously wouldn't require renotice or anything like that or supplemental notice because it's been in the agreement. The agreement was on the settlement website. But to the extent there's a statement in the final approval order on this, that would be fine with us.

THE COURT: All right.

MR. BERRY: Your Honor, if I might, Wayne Berry for the Department of Labor, Your Honor. If I might just say a few words.

THE COURT: Yes, you may.

MR. BERRY: So the Department definitely believes that something in the final order, if it's, you know, language we could all agree on, could go a long way to helping the situation.

But just a few things to bring to the Court's attention. The notion that, you know, this is like every other settlement and everything occurs downstream, I understand the appeal of that. And to a certain extent, it's absolutely correct except one difference here is that the ERISA plans are class members and could have been given a seat at the table but were not.

The other thing about --

THE COURT: Am I to understand -- I guess I don't understand that. Are they -- how were they not adequately represented by the groups that were at the table?

MR. BERRY: Well, because if the employer is acting as the employer when he's negotiating as opposed to the plan fiduciary, he's not acting for the benefit of the plan.

THE COURT: All right. So --

MR. BERRY: It's a little difficult -- it's a little difficult for the employer to act in both capacities and do both -- represent each equally well.

THE COURT: Let's -- we're talking about the monetary relief that you're concerned about, not any type of structural relief; correct?

MR. BERRY: Yes.

THE COURT: All right. So monetary relief. What would someone -- what would a plan have done differently sitting at the table? It would have tried to maximize the amount that every member of the class got; correct?

MR. BERRY: I believe it -- that would be true. But I think it would have been focused on -- as Mr. Hahn has alluded, on making sure that there is some representation in the division of the proceeds --

THE COURT: Okay. Let's --

MR. BERRY: -- between an employer's share --

THE COURT: Let me see if I can get an answer to my question.

MR. BERRY: Yep.

THE COURT: The first thing is let's maximize the

amount everybody gets; correct?

MR. BERRY: Correct.

THE COURT: All right. No question -- you're not raising a concern on behalf of the Department of Labor that that failed, are you?

MR. BERRY: No, sir. No, sir.

THE COURT: All right. So your question is allocation.

MR. BERRY: Well --

THE COURT: Should we have something built into the process that makes sure that an ERISA plan gets what an ERISA plan is entitled to legally in the settlement; right?

MR. BERRY: Yes. To put it in your terms, that the ERISA plan maximized its return under the settlement.

THE COURT: But each plan's maximization is going to depend upon the unique circumstances of how many claimants there are within that plan; correct?

MR. BERRY: It could, yes.

THE COURT: I think it would. Won't it?

MR. BERRY: Well, I think there's a couple of things that could impact that. There's a provision in the settlement, as I understand it, if a claim actually turns out to be $5 or less, the claim isn't going to be paid. So if a large number of employees file claims, that's going to drive down the dollar amount for each of that employee's claims. So we could --

THE COURT: That would be an across-the-board concern;

right? That's not just unique to ERISA plan members. That's --

MR. BERRY: No. That's absolutely right. But I think it illustrates sort of the points that we were making where you could have a situation where just because of the way the settlement is structured in that sense, those employees whose claims won't be paid -- they've already submitted a claim, so we already know there's a claim on that. But that pot of money, I believe, then goes back into the group money and goes back to the employer.

THE COURT: Well, at that point --

MR. BERRY: So it's not -- it's not just one claim.

THE COURT: At that point, then -- let's say we have an ERISA plan that is particularly affected by that provision. They've got a number of employees who have made claims but they're all under the $5 limit and they're not paid out and, therefore, the employer ends up with what might be a larger amount of money based upon these *de minimis* claims being aggregated into its payment to the employer.

Those -- if there's no immunization of the employer with respect to ERISA obligations, those employees, then, are virtually identical to employees who made no claim. They can assert to the ERISA plan -- on behalf of the ERISA plan to the employer, hey, you've got a responsibility to put that money back in where it should be based upon your obligations. And it's going to end up back in the ERISA plan on a downstream

procedural mechanism. Am I missing something?

MR. BERRY: I think Your Honor is correct. I just wonder if because we know that claim has been filed and been determined to be *de minimis*, if that addresses some of the concern on the settlement administrator's side of having to identify on a case-by-case basis, you know, claims that weren't made. Right? I mean those claims would have been made.

THE COURT: Let me ask this. Let's say you could even retain Mr. Hahn to help you. How much would you charge me to be the claims administrator that has to do all this granular analysis in this settlement?

MR. BERRY: I understand Your Honor's point, and I agree with you a hundred percent. This is not going to be something that is going to be inexpensive. I can't put a number on it, but I can agree with you that there is going to be additional cost for this. But one other --

THE COURT: It would slow down -- it would slow down the claim proceeds getting to everyone who makes a claim and, arguably, it would slow down the claim process for the ERISA plans to get their money. Even if they could get it directly through the settlement, I can make a pretty strong argument, I think, that they're going to get this money more quickly if we don't include this type of granular analysis on the -- place that on the claims administrator's plate, pay the money to the employer, and let each plan assess whether the employer has

fulfilled its responsibility by distributing -- allocating the money correctly.

And if they haven't, it's -- you know, ERISA litigation is usually on a pretty quick track in my court. We don't have juries. It's usually decided on the papers. I think most of the facts in a case like that would be undisputed. It seems to me they would have a much more quick resolution of their concerns than they would if they had to have the claims administrator do this on a one-by-one basis and then, if they didn't like the claim administrator result, go to whatever appeal committee and ultimately end up in the court. That could take years.

MR. BERRY: Your Honor could absolutely be correct. I can't -- I can't say that you're not.

One thing, to address something else that was said here about there not being any -- you know, anything skewing this one way or another, there's one particular FAQ, number 38, which asks the question: Is the employer required to share their recovery? And it says no. So at the very --

THE COURT: All right. Hold on. Hold on. Do you have frequently asked question number 38 there before you?

MR. BERRY: I can pull it up.

THE COURT: Because I think it doesn't just say no. There's a qualification there.

MR. BERRY: No, no, I understand that. But I think --

and the parties --

THE COURT: If we were in front of Judge Pointer, I would object and say, "Ought, in fairness, Your Honor." They have to read the whole response, not just the part they like.

MR. BERRY: I understand. And the parties -- we have -- part of our discussions with the party is changing that language. And so I don't think that's really going to be an issue. I'm just pointing out that the impression that's created by some of the terms of the settlement agreement are that the employer doesn't have to share or comply with any other obligations.

THE COURT: Well, the point is that the settlement agreement is clear that it makes no statement about an employer's responsibility under ERISA with respect to what to do with the funds it receives on its own behalf and on behalf of others, including an employee plan. Then that frequently asked question number 38 would cut no ice at all for an employer saying, I get to keep this money.

MR. BERRY: It could be read that way. That's correct, Your Honor. I think it can also be read differently.

THE COURT: But the point of the frequently asked question is not --

MR. BERRY: Understood.

THE COURT: It does not create any legal rights --

MR. BERRY: Understood.

THE COURT: -- or defenses.

MS. GEE: Your Honor -- oh, sorry.

THE COURT: Go ahead, Theresa.

MS. GEE: Your Honor, Theresa Gee. And this is my first time before you. I'm here on --

THE COURT: I think I said hello to you at the fairness hearing, though, didn't I?

MS. GEE: You did. And thank you very much. And that was -- not being an antitrust lawyer -- I'm an ERISA lawyer. So hearing two days of arguments was very informative and made me thank my stars that I deal with ERISA and not antitrust.

THE COURT: And I think, Theresa, in fairness, you heard what I said.

MS. GEE: Yes, I did. And so --

THE COURT: Mr. Isaacson said that if they had known how much money and time they were going to put in this case, they might not have taken it. I said, well, if I had known I was going to be dealing with ERISA, I may not have taken it.

But go ahead. I appreciate that there's smart, committed people like you and Mr. Berry and Mr. Hahn out there that deal with this stuff on the front lines.

MS. GEE: I appreciate that, Your Honor. I just wanted to make a couple of observations before we move on to Mr. Hamish Hume's points. One deals with the authority of the settlement administrator and what that settlement administrator should or

should not do.

And we've heard, you know, the Department's views about the settlement administrator having this allocation authority essentially adjudicating ERISA claims, you know, through an antitrust settlement process. And just to quickly point out that in DOL guidance dealing with situations like this and in class action settlements not in antitrust, but in a securities context, the DOL's view has been that what the employer does with the funds that they receive after the distribution is left to the employer and to the plan fiduciary. In other words, neither the court nor the litigating parties put themselves into the shoes of the employer or the fiduciaries when it comes time to figuring out how to dispose of the settlement proceeds after they have been distributed.

And the reason for that is, for example, in this context, even though the DOL guidance would say that the -- a portion of the settlement proceeds attributable to employee contributions should be repaid to the employees, in a class that covers -- or class period that covers 12 years, that may not be the fiduciarily prudent thing to do because of the cost. It may be that those proceeds are used by the plan to benefit current participants as opposed to past participants, or perhaps those settlement proceeds are used to pay administrative costs, but it's left to the fiduciary's discretion to decide how those proceeds should be used. And it should not be in the -- the

settlement administrator should not have that responsibility because the settlement administrator is acting under the framework of a court -- cross-court reviewed and appointed process in an antitrust action.

THE COURT: Theresa, are you suggesting someone might show up if we had the process that the Department of Labor suggested and say that, yes, it may very well be the plan administrator totally botched this very complicated ERISA calculation on this particular plan -- on behalf of this particular plan, but there's no review of that because even though he or she is not an ERISA expert and may have gotten it wrong, that decision is inoculated if we're forcing the plan administrator -- I'm sorry -- the claims administrator to do that?

MS. GEE: So --

THE COURT: Again, on a case-by-case basis, we have tribunals, we have parties, we have mechanisms to enforce ERISA rights. And it's -- one, I don't think our claims administrator -- the advertisement was that you had to know something about ERISA and be able to adjudicate what may or may not be somewhat off-the-beaten path ERISA claims on allocation like this. And second, we have people that are duly authorized under the law to adjudicate those, and we would have a more timely, quicker process for those issues to be joined and decided if there was -- an employer steps out of line with

respect to how it allocates the funds. That would be a much easier, quicker way to get the right result.

MS. GEE: And obviously, Your Honor, we agree with that.

With respect to Mr. Hahn's point about the unclaimed employee contributions, you know, those moneys that were paid by employees, slash, participants over the 12-year period and for which the participant or the employee chose not to submit a claim, that sort of ignores the fact of the notice that was provided in this Court to 100,000 -- or I'm sorry -- 100 million class members and notice that was sent out via email, via postcard, via media, press releases, TV, radio announcements. I mean, the airwaves were inundated with notice about this settlement. And if a plan participant wanted to submit a claim, they had every right and reason to submit a claim.

The default option that was arrived at in this Court and as supported by Mr. Chodorow's declaration, as found reasonable by both the special master and by Mr. Feinberg, if that default option had been presented in an ERISA lawsuit involving, you know, excessive premium payments, it would be very difficult to challenge those findings as being unreasonable or imprudent because those findings were based on studies of the health industry, studies of the split between employees, both individually and as families, and contributions paid by the employers.

So even though those findings were made in an antitrust context and by an economist without regard to, you know, what it would mean in an ERISA world, looking at it through an ERISA lens, the standards that were applied to arrive at those conclusions are very similar to the prudence and loyalty standards that would apply to ERISA fiduciaries. And so I -- you know, I'm sure we'll get to those issues later, but I did just want to raise those and flag them for the Court now.

THE COURT: Thank you for that. Mr. Hume, have we left anything for you to say?

MR. HUME: Not much, Your Honor, but that's okay. I think my colleagues have done a great job making the relevant points. There are just one or two to add to the Court's observations that we agree with, that it would be both -- the Court's observation that it would be inefficient and unduly burdensome to try to task the claims administrator or the settlement administrator with resolving ERISA allocations. I just wanted to add, with some points that haven't been made, that in addition to that, it would also be conceptually inappropriate to do that for reasons that have been acknowledged but have not been fully fleshed out.

First and foremost, conceptually, this was an antitrust case against the Blue plan, the Blue entities, not an ERISA case between employers and ERISA plans. And that's why the release in the settlement clearly does not release ERISA claims between

employers and their plans and participants. That is also why the ERISA plans were absolutely adequately represented because, as Your Honor said, all the class representatives wanted the same thing those ERISA plans wanted, which is the maximum possible recovery. There was no effort in the settlement agreement to allocate money between plans and employers; therefore, there was no need for separate representation because that is an ERISA issue, not an antitrust issue. It was downstream. And that is why there was adequate representation.

It's also why there was adequate and proper and more than abundant notice. Because the best evidence of who the antitrust claimants were are the people who were the purchasers and policyholders. And the best evidence that exists in the world of that is in the data of the defendants of the (unintelligible) of these plans. And that's what was used to give notice.

THE COURT: The default option that Ms. Gee referenced earlier is just that, a default option. That doesn't set anything in stone in terms of downstream processing of these funds. But that was based upon the Kaiser Family Foundation and other academic studies that analyzed out-of-pocket contributions by plan participants for health care coverage?

MR. HUME: That's correct, Your Honor, as well as other factors and multiple factors that are set forth specifically in the plan of distribution. But it was based on that objective

(unintelligible) and related factors about who the antitrust claimants were without any prejudice to anyone's ability to raise an ERISA claim downstream of the receipt of the settlement funds.

And just finally, Your Honor, there's really one more point, which is to emphasize this conceptual distinction between downstream ERISA issues and the distribution. The Department of Labor has pointed to guidance it issued in the context of rebates under the Affordable Care Act under the medical loss ratio rule that went into effect in 2012, which essentially said that if health insurance companies made more than a certain amount of profit, they needed to rebate that amount back to their subscribers; in essence, a statute for a rebate of an amount that was deemed congressionally to be too high, too much of an overcharge, and so it had to be paid back.

And the Department of Labor did not go to CMS, the agency charged with administering that, and say, well, wait a minute, you need to issue rules between the ERISA plans and the employers and the subscribers as suggested. They didn't go to the insurance company and say, wait, before you issue any money, any MLR rebate, you need to do an ERISA allocation.

Instead, they recognized that the ERISA allocation was downstream of the distribution of the money. And they issued guidance 2011-04 -- technical release 2011-04, and they relied on the employer or the recipient of the MLR money to comply with

that guidance and sort it out and do exactly what the Court is saying here, which is rely on the employers and the ERISA plans to sort it out and to comply with ERISA.

Furthermore, to underscore the Court's observation that this could be highly factually complex, if you read that technical release, it's remarkable just how many forks in the road there are. I count seven or eight, potentially nine, "if" clauses in that release as to where the -- how the money should be shared. If the policy was held by the plan, one thing happens. If the policy was held by the employer, another thing happens. If the policy was held by the employer and the plan paid the policy premiums, then one thing happened. If the plan was held by the employer but the employer and the employee paid the premiums, then another thing happened, and on and on and on, multiple "if" clauses, multiple factual inquiries that would be very burdensome for a settlement administrator to undertake.

And it's conceptually inappropriate because this is an ERISA allocation issue that is downstream of the distribution of the antitrust settlement money, just as the ERISA allocation was downstream of the return of MLR rebates under the Affordable Care Act.

So we very much respect the Department of Labor's desire to (unintelligible) ERISA (unintelligible). And we've offered to inform recipients and to remind everyone that ERISA still applies. No ERISA claims between employers and plans

(unintelligible) release. Reminding people is one thing. But assuming the burden of implementing ERISA allocations seems to cross a conceptual line which is not -- and the burden and efficiency line that is not in anyone's interest, in our view. So I think that's it, Your Honor. Thank you.

THE COURT: All right. Thank you. I guess I ought to let the Department of Labor respond to that if there is a -- if they care to.

MR. HAHN: Yeah, Your Honor. I think there are a couple points.

We can -- we can stipulate to a number of things for purposes of this argument. The default option being reasonable, we can agree to that for purposes of this argument. Fine. We can agree that no ERISA claims are waived by this agreement. Fine. We can agree that potentially, yeah, an employer could get a distribution and then they would have, you know, their, quote-unquote, downstream -- they could handle this downstream. And -- fine.

The question is, when the employer is handling this downstream, whether in fact they have any ERISA obligations to allocate money of a distribution that they got under a settlement agreement that was agreed to by the plans which appeared to give the employers this money. And so to put all of the -- all of this sort of -- our eggs in this basket of this sort of downstream scenario where employers are distributing

money that they negotiated -- that the plans negotiated -- under this agreement that appears to give it them, it's completely unclear what obligation they would have to allocate it other than altruism. And so --

THE COURT: Well, if it's unclear, isn't it unclear because ERISA is unclear?

MR. HAHN: Well, I --

THE COURT: I mean, to me, the whole point is you're trying --

MR. HAHN: The --

THE COURT: Let me finish. You're trying to incorporate obligations that an employer has that you contend that an employer has under law, and you're wanting to fold those into a process where we adjudicate those, essentially, or at least administer those as part of this settlement. All right?

So if it was -- if it's unclear what the obligation is once the employer has the money, it seems to me you'd have to say that it would be unclear about what the settlement administrator should do with the money before it actually pays it out. It's the same -- it's the same question, the same analysis.

So what we're doing, again, is, you know, it seems to me, clogging up the system if we try to push that type of analysis into the claims administrator's repertoire before the money is actually earmarked or distributed. I didn't -- I gave

Mr. Berry the opportunity to tell me, but I'll give you the opportunity. What would it take to convince you to be the settlement administrator doing all that?

MR. HAHN: I -- I understand your concerns. On that point, I just want to say we have not -- we're talking now in realtime with the parties about the specific logistics of the administrator, how they would go about handling the situation that we're talking about pertaining to distributions. I honestly just can't tell you here exactly how burdensome that is. It may well be. And maybe there's ways to, you know, make that more efficient.

THE COURT: I think I can tell you how burdensome it would be. I think I have.

MR. HAHN: Sure. And that -- again, I -- well, I guess my -- my point, though, is that I just want to be clear that this -- what sounds like a very, you know, palatable, sensible scenario where employers are tasked downstream with this distributing money, it, I think, in our view, provides no assurance whatsoever that these -- that plans will be getting these contributions. And so our -- our essential goal here is to try to get there to be allocations, at least in the interest or for the benefit of the plans in the first instance.

THE COURT: Doesn't this -- and, again, I realize that ERISA rights are unique and they're dictated by the statute. But doesn't this basic analogy play out in a number of different

areas?

Blue Cross Blue Shield insures John Doe, who's involved in an accident at the corner of Elm and Main. And he hires a very reputable personal injury attorney, who sues the driver. Blue Cross Blue Shield, though, goes ahead and makes payments for the medical care of John Doe. The hospital covers uninsured portions of that and provides the service and provides a bill to John Doe for those services. John Doe either gets a settlement or a judgment against the driver. And downstream, once he's entitled to that money, we're also working out all the liens that deal with that. We don't ask the jury or the trial judge to determine, in the first instance, what everybody is entitled to from the pie. We award the pie, and then we let the parties figure that out on its own.

How is this situation really any different from that other than we've got the unique interests of ERISA, we have fiduciary obligations that some parties have, we have statutory obligations some parties have? Can you imagine how it would slow things down in the trial court if the jury was not only supposed to decide who was at fault and how much damage there would be but also start taking into account third-party interests in claims and assessing all -- how to split the pie up at that point?

MR. HAHN: Let me -- just to make another point here. I don't necessarily see what the settlement administrator would

be doing here as implementing ERISA in this allocation. What they would be doing is not dissimilar to what they are -- currently would be doing in a scenario where there's multi-employer plans, union plans, and there are multiple claims submitted by the purchasing entity and also by the contributing employers. In that scenario --

THE COURT: You just lost your practical approach if you don't see -- I understand in most cases it may not be a unique, specialized ERISA issue that has to be resolved, but there may be. I don't know. I can't say that. But what he would -- what he or she would have to be doing is slowing down the process to take in account, as Megan Jones said, this granular analysis of what money gets earmarked, what money gets allocated, as opposed to letting each different group go figure that out, either by negotiation or litigation, if necessary.

MR. HAHN: Yes. Again, I agree it would certainly be a more cumbersome process.

THE COURT: Yes.

MR. HAHN: You know, most likely.

THE COURT: And I think I have your argument. Anything else you want to raise other than we ought to force this issue into the claims administrator's hands on the front end?

MR. HAHN: We have nothing else to add.

THE COURT: All right. Anyone else -- anyone else not been given an opportunity to make their point?

MS. GEE: Your Honor, I've had an opportunity, but I'd like to have another opportunity. I know we're running a little late, but I just wanted to raise two things very quickly.

THE COURT: Well, we made you sit through two days of antitrust argument, so the least we can do is listen to a couple more points on ERISA from you.

MS. GEE: There may be three, so I promise it won't be more than three --

THE COURT: Well -- (participants speaking simultaneously)

MS. GEE: First, on the approach Mr. Hahn and Mr. Berry would suggest, what they would like to do is essentially have the settlement fund administered as if it were holding a pot of money that belongs to the ERISA plan. I mean, that's really what they're -- what they would like. I mean, they haven't come out and said that --

THE COURT: That's kind of a built-in assumption.

MS. GEE: Yes. But as a legal matter -- and this is a very technical ERISA matter. But their position stems from the view that -- although the Department does not say it explicitly, that the settlement funds hold plan assets; that is, something in which the plans have a property interest under ERISA. And that is a legal point that they have not made in their papers. That is a legal point that is completely unsettled. And, in fact, there are, you know -- there is fairly good authority out

there that settlement funds held in a fund before distribution to an ERISA plan is not an ERISA plan asset. That becomes a plan asset after it has been distributed.

So the -- and, you know, as much as the parties have been talking and trying to work with the Department to allay some of these concerns, to explicitly say that the settlement administrator should be instructed to make distributions only in accordance with ERISA or only in accordance with DOL guidelines is presuming a legal point that doesn't exist here.

The second point I'd like to make is that the Department has said a couple of times and they have said in their papers that the release by the settlement class of the settling defendants is a prohibited transaction. That is -- it's not the case. The Department says that it's prohibited because the plans are not receiving anything of value.

As we've talked about here, the plans' interests in this context is represented by the premiums paid by the plan participants. There are close to five million plan participants who have so far -- and, you know, there are more claims coming in every day -- who have so far submitted claims for premiums that they have contributed to over the class period. So the plans are receiving something of enormous value. They're also receiving great value through the injunctive relief provisions that the Court will be overseeing. So there is -- you know, there's just absolutely nothing to the point that the release is

something that the plans are giving away and getting nothing in return.

And finally, on the due process point that they raise in their papers, the Department says, well, you know, ERISA was never mentioned. It's not -- there's nothing about ERISA in the claim. There's -- you know, surprisingly, you know, in an antitrust case, ERISA was never brought up. And, you know, the notice and the various announcements and things that JND has been issuing talk about the fundamental issues in this case, which is excessive premiums, a class period of 12 years. If you think you have paid a premium or contributed to the cost of a premium for an insurance policy that was excessive because of this alleged anticompetitive conduct, come forward and bring your claims. Yes, that does not mention ERISA.

But just to quote a Nobel laureate from a few years ago, just like a weather man doesn't need to know which -- or doesn't need to be told which way the wind is blowing, an ERISA fiduciary does not need to be told that there are ERISA issues when they receive notice or hear about a claim or litigation involving an ERISA plan. So the due process notion and argument I believe is just, you know, highly technical and just ignores the substance of the information that's been provided.

And the final point, Your Honor -- this, again, goes back to the release and whether or not it's prohibited. The Supreme Court has said, you know, back in 1996, 25 years ago,

that unless there's some collusion, self-dealing, kickbacks, some insider sweet deal, the ERISA prohibited transaction rules do not apply and that making them apply in this context is hypertechnical.

And having sat through the two days of hearing, one of the great nuggets that I got from the hearing was Your Honor's comment -- I think it was on the second day -- in which you said something like there is no evidence of collusion. There's no indication of collusion in any area code in the United States with respect to this settlement agreement. And I don't have the transcript, Your Honor. I tried to -- I think that's roughly close to what you said.

THE COURT: I think that's close.

MS. GEE: And in that context, Your Honor, there's just nothing prohibited about the release of this case.

THE COURT: What would be -- I think everybody involved with the settlement agreed with that, that there's -- no one has come forward and said this settlement is, in any way, shape, or form, a product of any type of collusion.

MS. JONES: That's correct, Your Honor. Including the objectors in the courtroom.

THE COURT: Yes. It was hard-fought. Now, I think objectors have other questions and concerns about it. That just doesn't happen to be one of them. Okay.

MS. GEE: Thank you, Your Honor.

THE COURT: I think I have enough to take this under submission. I've probably given some indication of where I'm leaning right now, but this is something that I think we just need to make sure that rights are not in any way surrendered or no one is immunized from this type of analysis. But I do think it would be much too difficult to expect our plan -- I'm sorry -- our settlement administrator -- I've got too many administrators here -- our settlement administrator to perform this type of function as part of the claims processing, but that's not to say that that type of analysis shouldn't occur or won't occur. It's just where -- at what point does it make the most sense for it to occur.

And I think I'm leaning heavily towards saying that that is something that ought to occur downstream. I think the parties will have the same, if not greater, rights to enforce -- greater opportunities to enforce their rights. They'll have a much more quick and efficient process, and there will be individualized detail that could be given more quickly to those type of disputes, if they do occur, by the parties that normally are called upon to referee those; i.e., district judges around the country. And the parties are going to be free to negotiate a proper allocation on a case-by-case basis before we ever get to that point.

I don't want any of my colleagues around the country to think I'm trying to stir up extra business for them, but they're

there if they need to be there and the parties need them to be there.

All right. I think that concludes what I need to hear on the Department of Labor issues. I really want to thank the Department for being available and particularly thank you for deferring your time last week and agreeing to an audience this week. That really helped out with our scheduling of things. That was very gracious of you.

MR. BERRY: Thank you.

THE COURT: I also thank the parties for the same courtesy you've given the Court. That gave the Court some opportunity to deal with this issue off-line and devote more time during the hearing to a couple of the other issues, like the second Blue bid and the allocation issues that were raised by other objectors.

All right. And speaking of other objectors, I think I'm going to have the parties who I indicated should stay on to discuss the issue of retention agreements by the objectors' counsel. Anybody who has an interest in that should stay on. I am going to protect, until I make a ruling, the contents of any such retention agreements. We're just going to talk about the issues globally at this point. Okay?

(Off-the-record discussion)

THE COURT: I think we ought to say whoever has an interest. If you don't have an interest, it would really help

us to not have 72 participants that I'm trying to find on the screen. Okay? So I'll bid everyone else a good day.

MR. BERRY: Thank you, Your Honor.

MR. HAHN: Thank you, Your Honor.

(Brief pause)

THE COURT: All right. By way of background, the week before the fairness hearing, so week before last, I was called upon to referee a discovery dispute that was between the ASO subclass and some objectors.

And earlier, objectors had indicated that class counsel should provide any retention agreements they have with their class-representative clients so that that would be clear to everyone involved in this settlement, those who are litigating it, those who are observing it, those who are interested in it, to make sure that there's not any conflict of interest that class counsel would have vis-a-vis a class-representative client, individually signed-up client.

So I did require class counsel to disclose their retention agreements. It occurred to me as I was going through the process of analyzing that, though, that in the 2018 amendments, the rules committee and eventually Congress sanctioned some changes to Rule 23(e) that focuses on objectors and puts the spotlight on why someone is objecting.

Now, that's an important point to me, it seems, because in this instance, I don't know if anybody is really questioning

that we have a philosophical objector or a disgruntled "I lost out on my class claims" objector or anything along those lines. It seems like these are legitimate objections stated by counsel on behalf of clients. So I don't think this is in any way questioning counsel's involvement.

The question that I think some have raised is, okay, well, what about -- what about the parties that have retained counsel and their motivation behind this objection. So --

One second, please.

Kecia, do you need me?

(Brief pause)

THE COURT: We're still on the phone. I think we're fine to be on the phone. Yes. That's fine. Thank you.

Kecia was just making sure I knew we were still on the phone. And I take it those who are interested on the phone stayed on and those who aren't signed off.

All right. So I'm just trying to set the background here and set the stage for this -- any questions that are raised here. I said, well, I don't know that the public has any right to see the retention agreements of objectors because it's not a question of whether you're out policing the interests of the class. You're objecting on behalf of specific members of the class. But it seemed to me that it made sense in that light to have each person, perhaps, provide their retention agreement to those who are proponents of the settlement just so they'll --

and the Court -- so they'll know where you're coming from with respect to the objection, at least in that limited sense.

I've gotten -- I've -- one group of objectors I think had no issue with that and has provided. Another group has pushed back and said, we don't think we should be required to do that.

Mr. Cochran, if you wouldn't mind just turning your video off. Because it looks like you're having a nice walk, but it is a little distracting to see all the trees going by you. Thank you.

All right. So does that adequately set the stage for a discussion about where we ought to go from here?

Not everybody at once.

MR. BOIES: I think it does, Your Honor. I think it does.

THE COURT: Okay. So I think probably what we ought to start off with is any counsel for an objector who now has another objection, and that is objection to sharing any contents of the retention agreement. And the Court never contemplated the entire retention agreement would have to be shared. I think there's many aspects of a retention agreement that may be proprietary to a firm. I realize that y'all are fish in the same ponds for clients. Some of you are big enough that you fish in the same oceans for clients. So I never expected that you have to just turn over your retention agreement, but it

seems that there may be some aspects -- for example, compensation, how you're being compensated -- that may be relevant to the objection, may not be. I'll be glad to hear from you.

MR. SLATER: Your Honor, Paul Slater on behalf of the objectors who raised this issue. First, I'd like to thank Your Honor for giving us time to address this this morning. This is a matter of some importance to us and some importance to our clients.

Your Honor I believe correctly identified that this came up with a motion brought by the Bradley Arant firm with regard to agreements by subclass counsel. We were not part of that motion nor, like the Bradley Arant people, have we challenged the financial allocation within the settlement agreement.

I think the first point I'd like to make is that neither we, by which I mean myself and my cocounsel -- neither we nor our clients are professional objectors. My cocounsel and I, to my knowledge, have only once before objected to a class settlement; and that was in a case about five years ago or six years ago, involving American Express. And in their case, our objection was not only upheld, but class counsel was removed from representing the class for ethical breaches which we pointed out in the papers.

So the only thing that we have sought, Your Honor, from

the beginning is to -- as I told Mr. Boies and Mr. Hausfeld at the hearing last week, is to let my people go. We would like to be able to pursue our own injunctive relief with regard to Blue bids, and we have neither sought nor have we been offered anything in exchange for dropping our objection. Indeed, our objection is really a motion to be -- to opt out.

And given Your Honor's -- I don't know if it's a ruling, Your Honor, but given what was said at the hearing last week and I think what was a pretty clear indication of what Your Honor -- how Your Honor views this, we have, you know, given some thought as to what we will do if we can get language in the new agreement or the Court's approval order that satisfies us that we can meaningfully go forward and seek additional Blue bids for our clients.

And I -- again, the devil is in the detail, and we don't have the exact language yet. But there's a very good chance that if that language is satisfactory to our clients and ourselves, that we would not go forward with our objections or our motion to opt out at all. We would just avail ourselves of the opportunity which Your Honor has indicated you will give to class members to pursue their own injunctive relief with limitations of not infringing on Your Honor's (b)(2) settlement release.

And in light of that, we have been in contact with class counsel and have discussed meeting and trying to resolve

the exact language that would be, you know, approved by Your Honor providing for the -- (participants speaking simultaneously)

THE COURT: -- if you would be willing to stipulate the three things that may resolve all this.

MR. SLATER: Sure.

THE COURT: One, you have been retained by certain clients --

MR. SLATER: Yes, sir.

THE COURT: -- to come in and clarify or enforce what they contend are their rights to opt out and receive a second Blue bid or additional Blue bids by pursuing their antitrust claims as opt-outs in courts of competent jurisdiction. That's the first thing.

MR. SLATER: Yes. I --

THE COURT: Second thing is you're not making any challenge to the monetary aspects of the class settlement, whether that is the amount that was negotiated or how it ought to be allocated.

And third, that your client's sole interest and the only thing you've been retained to do and perhaps compensated to do is to pursue issue number one, not issue number two.

MR. SLATER: I'm not sure I understand the third point. The first two, yes, but -- (participants speaking simultaneously)

THE COURT: In other words, the only thing you can -- the only thing you're being compensated to do is to pursue their rights to opt out and assert monetary damage claims under (b)(3) that they're entitled to do clearly under the agreement --

MR. SLATER: Yes.

THE COURT: -- and also to pursue individualized injunctive relief, whatever that might look like. And I know you're talking to the Blues and the subscribers and the ASO class about that. You're not -- in other words, that's the only thing you've been retained to do is to deal with the -- that limited structural aspect of the settlement.

MR. SLATER: Yes, sir. I can stipulate to all of that.

MR. BLECHMAN: As can I, Your Honor.

THE COURT: All right. Great. Well, then, I take it Mr. Slater is speaking on behalf of everyone, but that's the interest here. So --

MR. BLECHMAN: Okay.

THE COURT: Who -- is there anyone who would say if they stipulate to those three things, we have to know what the terms of their compensation are in pursuing that relief? I don't know that that's similar to someone who -- for example, like the Bradley Arant objectors who had a deal with their clients that they were being compensated on a percentage of increase in settlement value to various persons monetarily. It seems to me this is pretty straightforward, and I don't know

that I -- based upon that, I don't know why I should require them to disclose their retention agreements.

MR. HAUSFELD: With regard to your stipulation -- their agreement to your stipulations -- sorry, Your Honor -- subject to, again, hearing from Mr. Boies, but I would find that acceptable in terms of resolving the issue of producing the retention agreements.

THE COURT: All right. David?

MR. BOIES: I agree. I agree completely, Your Honor.

MS. JONES: And, Your Honor --

THE COURT: So essentially, this is easy. And, you know, I felt like rather than make a -- I was inclined to not require Mr. Slater to disclose that, but I thought everybody ought to have their chance to weigh in.

Anybody who thinks, no, that's not good enough, we ought to make Mr. Slater and his colleagues disclose any aspects of the retention agreements under those circumstances?

MS. JONES: No, Your Honor. As long as it's clear on the record Mr. Slater speaks for all of his cocounsel.

MR. SLATER: In this context, I do.

THE COURT: You're confident to; right, Mr. Slater?

MR. SLATER: Well, we've all had the rug pulled out from under us before, but yes, I am confident --

THE COURT: The thing to pass along is if they take any position different than what you've just articulated in this

case, then we may or may not have to revisit this ruling.

MR. SLATER: Well, Your Honor, you know, not to be cute about this, my cocounsel are on this phone -- on this call right now. Mr. Blechman is on the call. Mr. Phil Cramer is on the call. Mr. Jason Zweig is on the call. Between those people I just identified, those are all the lead counsel for the claimants that I am speaking for. And I am quite sure that if I had said something out of school, that they would have piped up. So I can speak for all of the cocounsel I have with regard to our objections and motion to opt out of the class settlement.

THE COURT: Mr. Slater, as I'm used to you doing already, you've presented your position clearly and articulately. And I think you're right. I don't think there's any reason to make you disclose that information under these circumstances.

So let me ask -- let me move to another kind of surprise question -- probably not a surprise, just not on the agenda. I gave you my -- a few thoughts last week about how this might play out. I got the strong signal from all camps, Judge, we appreciate your input, let us do our work and report back to you. I take it that's still where we are.

MR. SLATER: Your Honor, I believe that is where we are. We had some conversations. Mr. Blechman had some conversations with Mr. Hausfeld. Mr. Hausfeld is an old -- old friend and an old acquaintance, so we know the players very

well. And we have arranged with Michael to get together sometime in the very near future and see if we can agree on language that would allow my clients to just say we are satisfied with the resolution as outlined by the judge and the language that will implement that resolution and then take that to the defendants and see if we could obtain their consent to that language and that logistics, if you will.

THE COURT: Would it be fair -- would it be fair for me to say I'd like to keep things moving by establishing another soft backstop, meaning that maybe early next week, we set another Zoom call up to discuss this issue, unless the parties agree that that would get in the way of a resolution? I just want to keep things moving on this.

MR. BLECHMAN: Your Honor, may I --

If I might address that, Paul.

William Blechman for Kroeger and several other of the objectors, Your Honor.

Mr. Hausfeld and I have actually discussed a meeting to occur next week on a date that yet -- as far as I know, hasn't yet been set, but what we've actually talked about is talking this week about setting up a date certain and time certain for next week so that we can work at this problem, Your Honor. And whatever time frame Your Honor has for reporting back is fine, but I want you to know it's possible that you may end up setting a report date to the Court that may occur before we've actually

had the meeting next week. But our intention is for next week to be engaging with all the class counsel on this.

THE COURT: Well, so the reason I set those report dates is so that you'll accelerate your discussions.

MR. BLECHMAN: Sure.

THE COURT: But on the other hand, I realize this is not everyone's only case or matter in life, so -- it's a pretty significant one.

MR. BLECHMAN: Your Honor, I've told Mr. Hausfeld that on that note, my son is getting married next week. And as long as he promises not to tell my wife or to show this transcript to anyone in my family, that I would make myself available at times later next week, if necessary, if we're not able to meet before -- if we're not able to meet earlier in the week, Your Honor.

THE COURT: Well, it sounds like what I ought to do is set my backstop for week after next, early in the week.

MR. SLATER: Your Honor --

THE COURT: My son is getting married that week, so I've got to be careful.

MR. BLECHMAN: I'll let you know how it goes, Your Honor.

THE COURT: Yes.

MR. SLATER: Your Honor, one other point. We have advised Mr. Gentle of the conversations that we have had and

intend to continue with. And if it's all right with the Court, I think it might be helpful to continue to engage with Mr. Gentle on this process and seek his good offices and help us get the yes.

THE COURT: I have no objection to that. Now, it sounds to me like this is a three-step dance. One step is -- we've got scheduled for next week, and that is objectors and class counsel get together on what the language might be. Second step is bring in Mr. Zott and Mr. Laytin and their colleagues and make sure that they have input and are comfortable. And the third step is presenting it to the Court to make sure I'm comfortable.

So all I'm saying is with the two weddings coming up, let's just, to the extent possible, keep the pedal to the metal on trying to make progress.

MR. SLATER: Understood, Your Honor.

THE COURT: All right. Anything else we need to take up for any purpose now?

MR. HAUSFELD: No, Your Honor.

MR. BOIES: No, Your Honor.

MR. BLECHMAN: No.

THE COURT: All right. Keep up the hard work. Appreciate y'all.

MR. HAUSFELD: Thank you.

MS. JONES: Thank you, Your Honor.

MR. SLATER: Thank you, Judge.

MR. BLECHMAN: Thank you, Your Honor.

THE COURT: I don't want to conclude without me saying that.

(Proceedings concluded at 11:35 a.m.)

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COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

This 5th day of November, 2021.

Risa L. Entrekin
Registered Diplomate Reporter
Certified Realtime Reporter
Official Court Reporter